Reversed and Remanded and Majority and Dissenting Opinions filed August 6, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00154-CR

THE STATE OF TEXAS, Appellant

V.

JOHN WESLEY BALDWIN, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 1527611

MAJORITY OPINION

In this interlocutory appeal from an order granting a motion to suppress, the main question presented is whether a search-warrant affidavit set forth enough facts to establish probable cause for the search of a cellphone. By issuing the search warrant, the magistrate implicitly determined that the affidavit was sufficient, but the trial court ruled that the affidavit was insufficient and suppressed all of the evidence obtained from the cellphone. Because we conclude that the trial court failed

to defer to all reasonable inferences in support of the magistrate's decision, we reverse the portion of the trial court's order granting the motion to suppress and remand for additional proceedings consistent with this opinion.

BACKGROUND

The Capital Murder. Two masked gunmen killed a homeowner during the course of committing a robbery. The homeowner's brother witnessed the offense, and he said that each of the offenders was black and that they fled the scene in a white, four-door sedan.

Investigators canvassed the neighborhood for information about the sedan. They obtained security footage from a nearby residence showing a white sedan suspiciously circling the neighborhood on the day of the capital murder, as well as on the day before. On four separate occasions, this sedan entered a cul de sac, drove to the front of the residence where the capital murder occurred, and then turned around.

One neighbor came forward and informed investigators that a white sedan matching the same description had passed by his residence three times shortly before the capital murder. The neighbor added that the sedan was driven by a large black male.

A separate neighbor also came forward and said that she had seen a white, four-door sedan casing the neighborhood on the day before the capital murder. This neighbor said that there were two occupants in the sedan, and that they were both black men. She also revealed that she was so concerned by the sedan that she took a picture of it, and her picture captured the sedan's license plate.

Using that license plate information, investigators learned that the sedan was registered to the stepfather of appellee John Baldwin. Investigators contacted the

stepfather, who said that he had recently sold the sedan to Baldwin, and that Baldwin was currently staying at his girlfriend's apartment.

Investigators then located the sedan at the girlfriend's apartment, where they waited for Baldwin to make a move. When Baldwin finally drove away in the sedan, investigators followed him in unmarked units and requested a marked unit to develop probable cause to stop Baldwin for a traffic violation.

A marked unit eventually pulled Baldwin over for unsafely crossing two lanes of traffic in a single maneuver and for driving over the "gore zone," which is the triangular portion of a highway exit. Baldwin was arrested for those traffic violations, as well as for driving with an expired license and for failing to show identification on demand. Because no other person was available to drive the sedan away, investigators impounded the sedan at police headquarters.

At headquarters, Baldwin gave a lengthy statement, which spanned several hours. He also consented to have his sedan searched. A cellphone was found in the sedan, but Baldwin refused to give his consent to have the cellphone searched.

Investigators then applied for a warrant to search the contents of the cellphone. A magistrate issued that search warrant.

The Motion to Suppress. Baldwin moved to suppress the evidence of his statements on the grounds that he did not commit a traffic violation. Continuing with that same reasoning, Baldwin argued that the cellphone evidence should also be suppressed as fruit of the poisonous tree, or alternatively, because the affidavit in support of the search warrant was legally insufficient to support a finding of probable cause.

A hearing on the motion was held before the Honorable Denise Collins. After considering the evidence and arguments of counsel, Judge Collins orally found that

the traffic stop was pretextual, but lawful. Judge Collins then denied the motion to suppress Baldwin's statements.

As for the cellphone evidence, Judge Collins determined that the affidavit was insufficient to connect either Baldwin or his cellphone to the capital murder. Judge Collins criticized the affidavit for what it lacked, noting three particular omissions: (1) the affiant reported that one witness had identified the driver of the sedan as a "large black male," but the affiant merely described Baldwin as a "black male," without identifying his size; (2) the affiant did not explain how investigators had tracked down Baldwin to his girlfriend's apartment, even though that information was known to them; and (3) the affiant did not indicate that Baldwin was the actual owner of the sedan where the cellphone was found.

Judge Collins ruled that the motion to suppress should be granted in part as to just the cellphone evidence, but she never reduced this ruling or any of her findings to writing before her term of office expired. Without a written order, the State had nothing to appeal.

Judge Collins was then succeeded by the Honorable Greg Glass, who issued a written order on the motion to suppress. But without having conducted any hearing at all, Judge Glass granted the motion in its entirety—i.e., as to both the cellphone evidence and the evidence of Baldwin's statements. And like his predecessor, Judge Glass did not enter any written findings in connection with his ruling.

The Appeal and Abatement. The State brought this interlocutory appeal of Judge Glass's written order, raising two issues in its brief. First, the State argued that Judge Glass should not have suppressed the cellphone evidence because, when viewed in the light most favorable to the magistrate's decision, the affidavit actually supported a finding of probable cause. Second, the State argued that Judge Glass should not have suppressed Baldwin's statements because Judge Collins had

previously found that the traffic stop was lawful, and that finding was supported by evidence adduced at the hearing.

We set the case for submission with oral argument, where we raised our own set of concerns. We explained that we could not address the sufficiency of the affidavit without first addressing the lawfulness of the traffic stop, because if the traffic stop had been unlawful, then all of the evidence would need to be suppressed under the exclusionary rule (unless an exception applied, which the State had not suggested). We also explained that the unusual procedural history of this case prevented us from inferring Judge Glass's finding as to the lawfulness of the traffic stop. More specifically, we explained that we could not determine whether Judge Glass believed that the traffic stop was unlawful (which was the implication of his ruling, even though he never presided over a hearing); or whether Judge Glass had intended to adopt the finding from Judge Collins that the traffic stop was lawful, but he inadvertently granted more relief instead (which might explain why he did not conduct a hearing in the first place).

To settle these questions, we abated the appeal and remanded the case to Judge Glass with instructions to clarify the scope of his order. Upon remand, Judge Glass held a brief hearing, where he explained that he had intended to adopt all of Judge Collins's rulings. Judge Glass then signed an amended order granting the motion to suppress in part as to the cellphone evidence, and denying the motion in part as to the other evidence obtained following the traffic stop.

Because the amended order has mooted the State's second issue on appeal, we need not address the parties' arguments concerning the lawfulness of the traffic stop or the seizure of the cellphone. We focus instead on the State's first issue regarding the sufficiency of the affidavit.

ANALYSIS

To search a person's cellphone after a lawful arrest, a peace officer must submit an application for a warrant to a magistrate, and the application must "state the facts and circumstances that provide the applicant with probable cause to believe that (A) criminal activity has been, is, or will be committed; and (B) searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A)." *See* Tex. Code Crim. Proc. art. 18.0215(c)(5).

The critical term in this requirement is "probable cause." Though that term has no statutory definition, its meaning has been developed by case law, and it exists where there is a "fair probability" that evidence of a crime will be found at a particular location. *See State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012). This is a flexible, non-demanding standard that requires courts to consider the totality of the circumstances. *Id.*

The magistrate decides in the first instance whether the applicant established probable cause, and if the magistrate determines that the applicant satisfied her burden, then the magistrate's decision to issue the search warrant is entitled to a high degree of deference. *See State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). When a party moves to suppress evidence obtained from the search warrant, the trial court is not permitted to conduct a de novo review of the magistrate's ruling. *Id.* at 272. Instead, the trial court's duty is to determine whether the evidence was legally sufficient for the magistrate to find probable cause. *Id.* The trial court's scope of review is limited to the same evidence that the magistrate considered, which is the affidavit offered in support of the search warrant. *Id.* at 271. And the trial court must construe that affidavit by using common sense and logic, and by drawing all reasonable inferences that the magistrate could have made. *Id.*

We, as an appellate court, are bound by the same deferential standard of review as the trial court. *See Hyland v. State*, 574 S.W.3d 904, 911 (Tex. Crim. App. 2019). We presume that the magistrate's decision was valid, and we must uphold that decision if we can determine that the magistrate had a substantial basis for finding the existence of probable cause. *Id.*

We begin by observing that Judge Collins incorrectly focused on the facts that had been omitted from the affidavit. Those omissions are not relevant to our analysis. Under a correct application of the standard of review, we focus on the facts that actually appeared within the four corners of the affidavit and the reasonable inferences from those facts. *See Rodriguez v. State*, 232 S.W.3d 55, 62 (Tex. Crim. App. 2007) ("The inquiry for reviewing courts, including the trial court, is whether there are sufficient facts, coupled with inferences from those facts, to establish a 'fair probability' that evidence of a particular crime will likely be found at a given location. The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; we focus on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit.").

Turning now to the evidence, we first consider whether there were sufficient facts in the affidavit to establish probable cause that criminal activity had been committed. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(A). As to this issue, the affidavit contained an abundance of evidence. The affiant explained that she was assigned to investigate the capital murder of a homeowner. The affiant said that she spoke with the homeowner's brother, who was present for the offense. The brother revealed that two men had forcibly entered the home, that one of them had shot the homeowner, and that both of them had made off with a box of money and receipts from the homeowner's family-run business. Based on these facts, the magistrate had a substantial basis for implicitly finding that criminal activity had been committed.

The next question is whether there were sufficient facts in the affidavit to establish probable cause that a search of Baldwin's cellphone was likely to produce evidence in the investigation of the homeowner's capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). As to this issue, the affidavit did not contain any particularized facts that directly connected the cellphone to the capital murder. For example, there were no specific averments that the cellphone was used to film the capital murder as it was being committed, or that the cellphone had been used to communicate with the homeowner before the capital murder, which are factors that this court has considered in other warrant cases. *Cf. Aguirre v. State*, 490 S.W.3d 102, 116 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (in a case for continuous sexual abuse of a young child, the affidavit established that the defendant had photographed the child complainant with a cellphone); *Walker v. State*, 494 S.W.3d 905, 908–09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (in a case for capital murder, the affidavit established that the defendant and the complainant had discussed the commission of crimes over a cellphone); *see also Foreman v. State*, 561 S.W.3d 218, 237 (Tex. App.—Houston [14th Dist.] 2018, pet. granted) (en banc) ("An affidavit offered in support of a warrant to search the contents of a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after."). But even without such direct evidence, the affidavit still established that the cellphone was recovered from a sedan, and there were other facts establishing a nexus between the sedan and the capital murder.

The affidavit compiled the statements of three different witnesses, who set forth the following facts about the sedan:

1. According to the homeowner's brother, the two masked gunmen fled the scene in a white, four-door sedan.

2. According to a neighbor, a white, four-door sedan was circling the neighborhood several times in the hours just before the capital murder. This neighbor's statement was corroborated by security footage.

3. According to a separate neighbor, a white, four-door sedan was circling the neighborhood several times on the day before the capital murder. This concerned neighbor took a picture of the sedan, and her picture captured the sedan's license plate.

Because only the concerned neighbor was able to identify the sedan by license plate, there is no definitive proof that all three witnesses saw the same sedan. Nevertheless, this gap in the evidence does not end the analysis, because the process of determining probable cause deals with probabilities, not hard certainties. *See State v. Elrod*, 538 S.W.3d 551, 557 (Tex. Crim. App. 2017). Based on the combined logical force of the evidence, and viewing the evidence in the light most favorable to the magistrate's ruling, we conclude that the magistrate had a substantial basis for its implicit finding that the sedan that was witnessed by the homeowner's brother during the commission of the capital murder was the same sedan that was witnessed by the other two neighbors. *See Ford v. State*, 444 S.W.3d 171, 193 (Tex. App.—San Antonio 2014) (holding that an affidavit was sufficient to support the search of the defendant's vehicle where the evidence showed that the defendant had a known prior relationship with the murder victim and where surveillance photos showed a vehicle similar to the defendant's approaching the victim's residence on the night of the murder), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015).

That finding is further supported by the design of the neighborhood, which was described in the affidavit as having only a single point of ingress and egress. The affidavit also established that, once inside the neighborhood, there was just a single "circling boulevard with multiple small cul-de-sacs" branching out from that

main boulevard. Because the affidavit established that there was only one way to enter and exit the neighborhood, the magistrate could have reasonably inferred that accidental thru traffic would be uncommon, especially on consecutive days by vehicles of the same type. This inference likewise supports the reasonable conclusion that there was only one sedan, and that its driver was deliberately circling the neighborhood in preparation for the capital murder.

Because of the nexus between the sedan and the capital murder, the magistrate could have also made reasonable inferences about Baldwin, who was stopped while driving a white, four-door sedan with the same license plate identified by the concerned neighbor. Even though the affidavit did not affirmatively establish that Baldwin was the registered owner of the sedan or describe how he came to possess the sedan, the magistrate could have reasonably inferred that Baldwin was the owner because he was operating the sedan at the time of his traffic stop, which occurred only four days after the capital murder. Based on this inference, the magistrate could have also determined that there was a fair probability that Baldwin had participated in the capital murder.

Altogether, the evidence discussed so far has established only that Baldwin may have committed an offense, which is generally insufficient to support the search of a cellphone. *Cf. Riley v. California*, 573 U.S. 373, 401 (2014) (holding that the warrantless search of a cellphone cannot be supported under the doctrinal exception for searches incident to arrest). The pertinent question that still remains to be answered is whether there were other facts establishing probable cause that a search of Baldwin's cellphone was likely to produce evidence in the investigation of the capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B).

Aside from a brief statement that Baldwin's cellphone was found in his sedan, the rest of the affidavit contained only generic recitations about the abstract use of

cellphones. These recitations were all based on the affiant's "training and experience," and included such generalizations as the following:

1. "Phones and smartphones such as the one listed herein are capable of receiving, sending, or storing electronic data."
2. Such phones are capable of containing "evidence of their [user's] identity and others."
3. "Cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat."
4. "It is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications."
5. "Someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime."
6. "Often times, in a moment of panic and in an attempt to cover up an assault or murder[,] suspects utilize the internet via their cellular telephone to search for information."
7. "Searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device."
8. "Law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense."

These statements are "boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct," and affiants should not rely on such generalizations because they run the risk "that insufficient particularized facts about the case or the suspect will be presented for a magistrate to determine probable cause." *See United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996).

The fifth statement listed above, which could just as easily be rephrased as "criminals often use cellphones," exemplifies the sort of generalization that does not suffice to establish probable cause, at least under contemporary standards where cellphones are still used by nearly everyone, law-abiding or not. *See Riley*, 573 U.S. at 385 ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

Despite the breadth of these generic recitations, we believe that the fourth statement listed above is pertinent to our analysis. This statement established that criminal suspects use cellphones for planning purposes, and that fact has some bearing here because the affidavit established that the capital murder was committed, not by a lone wolf, but by two men acting in concert who prepared for the offense over the course of two days. The magistrate could have reasonably concluded that this joint activity required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone.

Courts in other jurisdictions have held that "an affidavit establishes probable cause to search a cell phone when it describes evidence of criminal activity involving multiple participants and includes the statement of a law enforcement officer, based on his training and experience, that cell phones are likely to contain evidence of

communications and coordination among these multiple participants." *See United States v. Gholston*, 993 F. Supp. 2d 704, 720 (E.D. Mich. 2014); *Johnson v. Arkansas*, 472 S.W.3d 486, 490 (Ark. 2015) (applying the same reasoning to a fact pattern similar to the current case); *see also United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *4 (S.D. Tex. Apr. 16, 2019) (holding that a "bare bones" affidavit with many of the same boilerplate recitations was insufficient to support a finding of probable cause because the affidavit contained no statements "directly referencing another individual's involvement in the incident"). This court applied that same reasoning in another recent case. *See Diaz v. State*, No. 14-17-00685-CR, — S.W.3d —, 2020 WL 4013189, at *6 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.) ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense.").

The reasoning in these collected authorities applies equally here. Based on all of the facts in the affidavit, the magistrate had a substantial basis for believing that a search of the cellphone would probably produce evidence of preparation, which would also include evidence of the identity of the other person who participated in the capital murder.

Baldwin asserts that too many inferences are required in this analysis. He argues that the affidavit is legally insufficient because there is no direct evidence that the sedan that he was operating at the time of his traffic stop was the same sedan that the two gunmen used on the day of the capital murder, nor is there any direct evidence that his cellphone was used before, during, or after the offense. These

points are unpersuasive because direct evidence is not an indispensable requirement for the issuance of a search warrant. *See Davis v. State*, 202 S.W.3d 149, 156–57 (Tex. Crim. App. 2006) (holding that a magistrate could have made a reasonable inference about an officer's qualifications to recognize the odor of methamphetamine). Reasonable inferences can be sufficient too, so long as the magistrate's basis for finding probable cause is substantial, and not tenuous. *Id.* For the reasons explained above, the affidavit in this case provided that substantial basis.

In another point, Baldwin argues that there is no evidence to support a search of the cellphone because the affidavit never established that the cellphone was found with anything that was obviously incriminating, like the murder weapon or the homeowner's stolen box of money and receipts. But this argument overlooks that the cellphone was found in the sedan, and as we have explained, there is a clear nexus between the sedan and the capital murder. Also, the ultimate question in this analysis is whether there was probable cause to show that a search of the cellphone was "likely to produce evidence in the investigation" of the capital murder, *see* Tex. Code Crim. Proc. art. 18.0215(c)(5)—not, as Baldwin suggests in his brief, whether "the incriminating nature of the cell phone was immediately apparent to the officers who seized it," which appears to invoke the entirely separate standard that governs the warrantless seizure of property discovered in plain view. *See State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013).

In one final point, which was raised in a post-submission supplemental brief, Baldwin argues that the search-warrant application was deficient because it did not "state the judicial district in which the law enforcement agency that employs the [affiant] is located," as required by Article 18.0215(c)(4)(A) of the Texas Code of Criminal Procedure. Baldwin did not present this argument to the trial court as an alternative basis for granting his motion to suppress, but even if he had, it would fail

on the merits. The affiant stated that she was "employed by [the] Harris County Sheriff's Office," and that this law enforcement agency has "an address of 601 Lockwood, Houston, Harris County, Texas." The affiant's identification of "Harris County, Texas" sufficiently stated the judicial district in which her law enforcement agency was located. *See* Tex. Const. art. 5, § 7 ("The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution."); Tex. Gov't Code § 24.407 (providing that "the 230th Judicial District"—the presiding judge of which acted as the magistrate in this case—"is composed of Harris County").

After considering the totality of the circumstances, we conclude that the affidavit contained sufficient facts, coupled with the rational inferences from those facts, to establish a fair probability that a search of Baldwin's cellphone would likely produce evidence in the investigation of the homeowner's capital murder. Insofar as the trial court failed to defer to the magistrate's evaluation of those facts and their inferences, its ruling was in error.

CONCLUSION

The portion of the trial court's order granting the motion to suppress is reversed and the case is remanded for additional proceedings consistent with this opinion.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Bourliot. (Bourliot, J., dissenting).

Publish — Tex. R. App. P. 47.2(b).